a

HONGKONG BANK MALAYSIA BHD

v.

WEXCEL HOLDINGS SDN BHD & ORS

b

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: D4-22-4198-98]
31 DECEMBER 2004

c ***CIVIL PROCEDURE:*** *Summary judgment - Appeal - Stay of execution - Whether appeal rendered nugatory if stay not allowed - Whether defendants would be prejudiced - Triable issues - Whether there were merits in defence - Rules of High Court 1980 O. 14 r. 1(1)*

d In May 1997, the plaintiff granted certain banking facilities to the first defendant amounting to RM2.14 million ('the facilities'). A year later, in May 1998, the plaintiff reviewed the terms of the facilities and made a fresh offer to the first defendant ('the second offer'). The first defendant seemed to have accepted the second offer, but had nonetheless submitted counter proposals on the reviewed terms ('the counter proposals'). The plaintiff did not accept or reject the counter proposals, and the first defendant continued to use the e facilities as usual. Subsequently, however, the plaintiff cancelled the facilities, sued the first defendant and the second and third defendant guarantors to recover the sums outstanding under the facilities, and obtained summary judgment in respect thereof. The plaintiff then went on to initiate bankruptcy proceedings against one of the guarantors and had also begun foreclosure f proceedings to liquidate the relevant securities. The defendants appealed to the Court of Appeal (against summary judgment) and, pending that, applied to the learned judge herein for a stay of execution of the judgment. *Inter alia*, arguments were put forth that the plaintiff's claim was not a proper case for summary judgment - thereby warranting a stay order - on account of the g following triable issues, namely: (i) whether the plaintiff was estopped from denying that it had agreed to the counter proposals; (ii) whether the plaintiff had a right to substantially change the terms of the facilities; and (iii) whether the first defendant had a legitimate expectation that the agreed terms of the facilities would not fundamentally change so soon after the same had been h agreed upon and adhered to.

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Held (allowing stay of execution):

[1] If stay of execution was not granted, it would cause the appeal that had been filed in the Court of Appeal to become redundant. (p 259 c)

[1a] It was clear that the plaintiff was intent on executing the summary judgment. Any execution proceedings against the first defendant, such as a winding-up, however, would freeze its banking accounts and eventually cripple its business. As for the second and third defendants, the filing of bankruptcy proceedings against them would surely prejudice their reputation as businessmen, considering that they had business dealings with various individuals, companies and financial institutions. Undoubtedly, the defendants would suffer more prejudice as compared to the plaintiff should their application for a stay be disallowed. (pp 259 f-g & 260 a)

[2] The reasons advanced by the defendants in arguing on the existence of triable issues were quite attractive. Clearly, the defendants had a defence on the merits and there were triable issues that needed to be considered by the court. The defendants had thus demonstrated 'an appropriate case' for the court to exercise its discretion in their favour. There was also no evidence that, if stay was granted, the defendants would dispose off their assets. (p 261 f-g)

[3] The plaintiff had already resorted to foreclosure action to realise the securities, and it would be appropriate that it should continue to do so before taking any action against the guarantors. In addition, the summary judgment carried with it an element of interest, so that, if the defendants were to fail in the appeal, the plaintiff would still obtain the judgment sum together with all interest payable thereto. (p 262 c-e)

Case(s) referred to:

A-G v. Emerson & Ors [1889] 24 QBD 56 ***(refd)***

All Persons In Occupation of the house (partly wooden and partly cemented) and the Wooden Stores Erected on a Portion of Land held under Grant No: 26977 For Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd [1998] 5 CLJ 49 HC ***(refd)***

Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 ***(refd)***

Clyne v. Deputy Commissioner of Taxation [1982] 56 ALJR 857 ***(refd)***

Hong Leong Finance Bhd v. Hon Hoi Weng & Ors [1987] 2 CLJ 277; [1987] CLJ (Rep) 656 HC ***(refd)***

Lee Kuan Yew v. Jeyaretnam JB [1991] 1 MLJ 83 ***(refd)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***
Scarborough v. Lew's Junction Stores Pty Ltd [1963] VR 129 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***
Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram (No 2) [2002] 1 CLJ 609 HC ***(refd)***
Tneoh Hong Seng v. Dayani Sdn Bhd [1998] 2 CLJ Supp 79 HC ***(refd)***
Tropiland Sdn Bhd v. DCB Bank Bhd & Ors [2000] 1 CLJ 568 CA ***(refd)***
Wilson v. Church (No 2) [1879-1880] 12 Ch D 454 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 1(1)

Other source(s) referred to:
Lord Denning, *The Discipline of Law*, 1979, p. 223

For the plaintiff - Lai Kok Wai; M/s Nik Hussain & Partners
For the defendants - Vinod Kamalanathan; M/s Chellam Wong

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Factual background

The plaintiff had granted a banking facility on an overdraft facility amounting to RM740,000 and a loan facility amounting to RM1.4 million to the first defendant. These facilities were received by the first defendant when the plaintiff's letter of offer dated 24 May 1997 ("first offer") was executed. The purpose of the facilities was for payment of the construction of a three storey market at Seremban.

Inter alia, the terms that were agreed between the parties was that the repayment scheme for the said facilities would be by way of 24 instalment payments amounting to RM65,446.08 for each and every instalment payment beginning from the month proceeding "full drawdown" or to a date that would be fixed by the plaintiff from time to time.

Whilst the facilities were being used by the first defendant, the plaintiff then decided to review the said facilities on 12 May 1998. This review gave the plaintiff the opportunity to change the agreed terms of the said facilities by incorporating the following terms in accordance with the plaintiff's letter dated 12 May 1998 ("second offer"):

(i) the loan facility which was for RM1.4 million was to be reduced to RM1,250,000;

(ii) the repayment period for the loan facilities would change to 24 monthly instalments of RM60,460 commencing from 26 June 1998; and

(iii) additional security worth at least RM1.55 million to be deposited and charged to the plaintiff by 30 June 1998.

The first defendant had decided to continue with the loan from the plaintiff and had signed and affixed the company's chop of the first defendant on the last page of the letter incorporating the second offer. By letter dated 12 June 1998, the first defendant had appealed to the plaintiff not to impose the additional security and that payments to be made in 36 instalments commencing from September 1998. The plaintiff had replied and rejected the appeal of the first defendant by way of a letter dated 4 July 1998. It is the stand of the plaintiff that the first defendant is estopped from stating that they are not agreeable with the second offer because the first defendant had utilised the banking facilities after sending the letter of appeal dated 12 June 1998. The overdraft statement of accounts showed that the first defendant had immediately withdrawn monies on 15 June 1998, 16 June 1998, 18 June 1998, 19 June 1998 and so forth.

Sad to say that the first defendant has yet to pay the sum owing or any part thereof to the plaintiff until today.

It is the stand of the plaintiff that it was entitled to review the loan facilities and imposed fresh terms as per the second offer.

It is the stand of the first defendant that by letter dated 12 June 1998, the plaintiff's fresh terms were never agreed to by the first defendant. Counter proposals were made by the first defendant to the plaintiff wherein the first defendant requested that additional security ought not to be imposed and that repayment should be in 36 months' beginning from September 1998. The first defendant then proceeded to execute the terms of the second offer subject to the terms of the first defendant's "counter proposals". Events showed that after the first defendant's "counter proposals" were accepted and the first defendant was allowed to use the facilities, the plaintiff suddenly on 20 August 1998 cancelled the facilities and claimed for the total amount of RM2,030,715.70 which the plaintiff claimed was the amount due and outstanding under the facilities.

Merits of the defendants' case

The defendants' stand may be summarised in this way. That the defendants have a defence on the merits. That there are triable issues for this court to consider and these triable issues may be stated in this way:

(1) Whether the plaintiff was estopped from averring that it had never agreed to the first defendant's "counter proposals" although the plaintiff had allowed the first defendant to use the facilities upon receipt of the "counter proposals"?

(2) Whether the plaintiff had a right under the first offer to substantially change the terms that were already agreed and adhered to by the first defendant?

(3) Whether the first defendant's refusal to adhere to the plaintiff's terms as incorporated in the second offer gives the plaintiff the right to recall the entire facilities?

(4) Whether the first defendant had a legitimate expectation that the agreed terms of the facilities would not fundamentally change in such a short span of time?

Summary Judgment And The Notice Of Appeal To The Court Of Appeal

On 8 August 2000, by way of a summons in chambers, the learned senior assistant registrar ("SAR") granted summary judgment under O. 14 r. 1(1) of the Rules of the High Court 1980 ("RHC") in favour of the plaintiff against the defendants.

Being aggrieved, the defendants filed an appeal to the judge in chambers dated 11 August 2000. My immediate predecessor heard that appeal and on 8 August 2002 he dismissed the defendants' appeal with costs.

Dissatisfied, the defendants filed a notice of appeal to the Court of Appeal on 30 October 2002 against the decision of my immediate predecessor. That appeal to the Court of Appeal is still pending.

The Stay Application In Encl. 17

The following principles governing the stay application may be stated in this way:

(1) that the appeal to the Court of Appeal does not of itself operate as a stay of execution;

(2) that it is entirely at the discretion of the court, to be exercised in accordance with the established principles, whether to allow or disallow the stay;

(3) that foremost in the mind of the court is the principle that the court should not deprive a successful litigant of the fruits of his victory pending an appeal unless there are special circumstances justifying the stay;

(4) would the defendants' appeal be rendered nugatory if the stay is refused?;

(5) that an order for the stay of proceedings is to be made sparingly and only in exceptional circumstances; and

(6) that if the stay is not granted, the defendants, even if they succeed in their appeal to the Court of Appeal, could not be restored to the same positions as they were in before the litigation sets in.

These general principles of law on stay are extracted from the following list of authorities:

(1) *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161, FC;

(2) *See Teow Guan & 10 Ors. v. Kian Joo Holdings Sdn Bhd & 3 Ors* [1997] 2 CLJ 299, CA;

(3) *All Persons In Occupation of the house (partly wooden and partly cemented) and the Wooden Stores Erected on a Portion of Land held under Grant No: 26977 For Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn. Bhd.* [1998] 5 CLJ 49;

(4) *Tneoh Hong Seng @ Teoh Hong Seng v. Dayani Sdn Bhd* [1998] 2 CLJ Supp 79;

(5) *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors* [1987] 2 CLJ 277; [1987] CLJ (Rep) 656

(6) *Tropiland Sdn Bhd v. DCB Bank Bhd. & Ors* [2000] 1 CLJ 568, CA; and

(7) *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram (No. 2)* [2002] 1 CLJ 609.

Now, the stand of the first defendant was this. That at no time had the first defendant failed or even breached any of the terms of the plaintiff's first offer. So, flowing from this, it was submitted that the plaintiff has no cause of action against the second and the third defendants who were the first defendant's guarantors. It was further submitted that the plaintiff's claims against the second and the third defendants were premature. It was the submission of the defendants that the plaintiff has recalled the facilities wrongfully in law because there was no breach of contract by the first defendant to allow the plaintiff to take such a drastic step. In fact, the plaintiff's conduct in implementing the fresh terms amounted to a clear breach of the first defendant's "legitimate expectation". In *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 All ER 346, Lord Fraser of Tullybelton spoke of "legitimate expectation" in this way (see p. 350 of the report):

> The narrower proposition for which the respondent contended was that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has a 'legitimate expectation' of being accorded such a hearing. The phrase 'legitimate expectation' in this context originated in the judgment of Lord Denning MR in *Schmidt v. Secretary of State for Home Affairs* [1969] 1 Al1 ER 904 at 909, [1969] 2 Ch 149 at 170. It is in many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In *Salemi v. Minister for Immigration and Ethnic Affairs (No 2)* [1977] 14 ALR 1 at 7 Barwick CJ construed the word 'legitimate' in that phrase as expressing the concept of 'entitlement or recognition by law'. So understood, the expression (as the learned Chief Justice rightly observed) 'adds little, if anything, to the concept of a right'. With great respect to the learned Chief Justice, their Lordships consider that the word 'legitimate' in that expression falls to be read as meaning 'reasonable'. Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: see *R v. Criminal Injuries Compensation Board, ex p Lain* [1967] 2 All ER 770, [1967] 2 QB 864. So it was held in *R v. Hull Prison Board of Visitors, ex-p St Germain (No 2*) [1979] 3 All ER 545, [1979] 1 WLR 1401 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it.

Translated to the facts of the present case, what Lord Fraser of Tullybelton said in that case can be paraphrased in this way. That the first defendant had a legitimate or reasonable expectation, based on the conduct of the plaintiff, that the "counter proposals" were accepted by the plaintiff and, consequently, the first defendant was allowed to use the facilities. The conduct of the plaintiff in allowing usage of the facilities constituted estoppel by conduct and thereby

prevented the plaintiff from recalling the said facilities prematurely. Perhaps Lord Denning describes the importance of estoppel in his book, "*The Discipline of Law* [1979]" better in these magical words (see p. 223):

> It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe that he may safely act on the faith of them - and the other does act on them - he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so.

So much for the rule on "legitimate expectation".

In my judgment, if the stay of execution was not granted, it would undoubtedly cause the Appeal that has been filed in the Court of Appeal to become redundant for the following reasons:

As Against The First Defendant

In the event a winding-up notice pursuant to the Companies Act 1965 is served against the first defendant following the execution proceedings of the summary judgment, there is a strong possibility that all the first defendant's banking accounts would be "frozen". If this happens, it would certainly cripple the business of the first defendant notwithstanding the fact that the first defendant has a good defence and an appeal on the merits. All these negative reactions would directly prejudice the first defendant's business reputation which has a business relationship not only with many individuals but also with numerous companies.

As Against The Second And The Third Defendants Who Were The Guarantors

Factually speaking the plaintiff has already filed a bankruptcy notice and is currently in the midst of serving the bankruptcy notice against the second defendant vide the plaintiff's solicitors' letter dated 10 October 2002. It is clear that the plaintiff intends to execute the summary judgment and it is also highly likely that the plaintiff would be proceeding against the third defendant in the very near future notwithstanding the fact that the defendants have already filed their appeal and that they have a defence on the merits.

If the stay is not allowed, the plaintiff would proceed with the execution proceedings which would unquestionably prejudice the second and the third defendants' reputation as businessmen. It must be borne in mind that both the second and the third defendants have various business dealings with not only individuals but also with various companies and financial institutions and if the stay is not granted they would be severely prejudiced in that their income would

be jeopardised to a large extent. Taken in its correct perspective, the defendants would suffer more prejudice as compared to the plaintiff bearing in mind that the defendants not only have a defence on the merits for their appeal but also the fact that the defendants' appeal to the Court of Appeal would become redundant if the defendants' application for a stay should be disallowed. The nugatory approach should also be put in the forefront. This was the stand of the Court of Appeal in *See Teow Guan (supra)* when Gopal Sri Ram JCA remarked at p. 312 of the report:

> In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Courts of Judicature Act 1964, is that the appeal to this court, if successful, should not be rendered nugatory.

In *Hong Leong Finance Bhd. v. Hon Hoi Weng & Ors (supra)*, VC George J (as he then was) allowed the application for the stay of execution and his Lordship had this to say (see the headnotes at p. 377 of the report):

> (1) in respect of applications for stay pending appeal, a distinction has to be drawn between a matter that was decided upon after full trial and enquiry and one summarily arrived at by a Senior Assistant Registrar. In the former case the general rule no doubt continues to be that special circumstances have to be shown (there could no doubt be exceptions to the general rule). But in the latter it seems to me that a demonstration that the probabilities are in favour of the appeal being allowed should normally be sufficient for the court to exercise its discretion to order a stay pending appeal.

In *Lee Kuan Yew v. Jeyaretnam JB* [1991] 1 MLJ 83, the defendant's application for a stay was not allowed because the judgment in which the defendant was attempting to stay was a judgment after a full trial where all the witnesses evidence have been heard to the fullest. Here, before me by comparison, summary judgment was obtained by the plaintiff without the benefit of hearing the defendants' evidence.

Factually speaking, cases like *Kerajaan Malaysia v. Dato' Hj Ghani Gilong (supra) and Tneoh Hong Seng @ Teoh Hong Seng v. Dayani Sdn. Bhd. (supra)* are distinguishable from that of the present case. In those two cases, there were no formal applications for a stay nor were there affidavits filed in support of the stay. Here, there was an application by way of a summons in chambers as reflected in encl. 17 for a stay accompanied by the necessary affidavit in support.

See *Teow Guan (supra)* favours the principle of nugatory approach. Briefly put, it means that if the stay is not allowed then the defendants' appeal would be rendered redundant. That was indeed the stand of the defendants that their appeal to the Court of Appeal would be rendered nugatory if their application for a stay was not allowed. It was urged upon me to allow the defendants' application for a stay as seen in encl. 17.

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram (No. 2) (supra) was a case relating to contempt and there the court refused the application for a stay by the defendant because no reason was given for the delay and the defendant too failed to purge the contempt before making the application for a stay. Here, the facts are different by comparison. The defendants filed a formal application for a stay as reflected in encl. 17 supported by an affidavit. Here, the issue of contempt has no relevance at all.

The onus was on the part of the defendants to demonstrate by affidavit evidence a proper basis for a stay. The mere filing of an appeal to the Court of Appeal will not afford a reason nor demonstrate an appropriate case nor will it discharge the onus of proof which the defendants have to bear. The court has the entire discretion to decide whether or not to grant the stay and, if so, on what terms to be adhered to so that fairness prevails. In exercising its discretion the court must weigh in a balance considerations like the balance of convenience and the competing rights of the parties (*A-G v. Emerson & Ors* [1889] 24 QBD 56). And after weighing in a balance the court is of the view that there is a risk that if a stay is granted, the assets of the applicant will be disposed off the court would certainly, in the exercise of its discretion, refuse to grant a stay (*Clyne v. Deputy Commissioner of Taxation* [1982] 56 ALJR 857). Here, there was no evidence that if the stay was granted the defendants would dispose off their assets. In my judgment, the defendants have demonstrated "a reason or an appropriate case" for me to exercise my discretion in their favour and grant the stay which they seek as per encl. 17. The reasons advanced by the defendant as alluded to in the early part of this judgment were quite attractive. They have a defence on the merits and there were triable issues. Thus, if a stay here was not granted, the defendants' appeal would prove abortive if the defendants' succeed in their appeal to the Court of Appeal. It must be borne in mind that the courts have, in the past, been magnanimous in exercising their discretion in granting a stay. Towards this end, the case of *Scarborough v. Lew's Junction Stores Pty Ltd* [1963] VR 129, 130 should be referred to because it is relevant and it makes for an interesting reading material. It is quite apparent in this case that unless this court grants a stay, the appeal to the Court of Appeal would be rendered nugatory (*Wilson v. Church (No. 2)* [1879-1880] 12 Ch D 454).

Of course it has been said, time and again, that the plaintiff is entitled to the "fruits of his victory" unless the defendants here can show "special" or "exceptional" circumstances which would warrant this court to impose an order of a stay. This simple proposition of the law goes back to the case of *The Annot Lyle* [1886] 11 PD 114, an old vintage case. Indeed, as demonstrated earlier, special circumstances do exist in this case. There are no two ways about it.

Here, the plaintiff had also taken a foreclosure action in order to realise one of the securities as seen in Shah Alam High Court Originating Summons No: MT4-24-3228-2001. So, it would only be appropriate that the plaintiff ought to realise the said security before the plaintiff takes any action against the guarantors – referring to the second and the third defendants. It is said that there is a big possibility that the security realised would be sufficient to settle whatever amount owed and that would be based on the guidelines issued by Bank Negara.

To date, the plaintiff has failed to show or prove that it will be prejudiced if the defendants' application for a stay would be allowed. There was nothing to show that even if the plaintiff would be prejudiced, it cannot be compensated by costs. It must be borne in mind that the summary judgment carries with it an element of interest and if the defendants fail in their appeal to the Court of Appeal, the plaintiff would certainly obtain the judgment sum together with interest payable thereto.

For all these reasons, I gave an order in terms of encl. 17 prayers (1) and (2) forthwith. This meant that I granted the stay as sought for by the defendants.